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No. 97-276

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

STATE OF SOUTH DAKOTA;
GARY VIKEN, Secretary of Revenue;

Petitioners,

v.

UNITED STATES OF AMERICA, on behalf of the Cheyenne River Sioux Tribe and its members,

and

CHEYENNE RIVER SIOUX TRIBE,

and

DEWEY COUNTY, South Dakota; JOHN ALLEY, County Treasurer; ZIEBACH COUNTY, South Dakota; VIRGINIA HERTEL, County Treasurer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

The majority panel mischaracterized South Dakota's one-time three percent excise tax on motor vehicles, SDCL 32-5B-1, as a "personal property tax" in order to reach the result that the tax could not be imposed upon CRST members residing within their reservation. This decision conflicts with *Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536 (5th Cir. 1992), where a motor vehicle sales tax functionally identical to SDCL 32-5B-1 was validated as to "off-reservation sales to Indians." Further, the majority below concluded (incorrectly) that *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993), overruled *Tunica*, when, in reality, *Sac and Fox* is distinguishable and should be limited to its own unique facts. Finally, the majority confused and commingled the principles of sales taxes and use taxes to reach their erroneous conclusions.

Both the CRST and United States briefs in opposition track the majority opinion. However, neither Respondent overcomes the conclusions in the dissent that the majority opinion conflicts with *Tunica* and represents an unwarranted extension of *Sac and Fox* which ought to be reviewed and reversed by this Court.

I. CRST MEMBERS PAID THE TAX AT ISSUE BECAUSE THEY WERE COMPELLED TO DO SO BY TRIBAL (NOT STATE) LAW.

The United States (U.S. Br. 2-4) and the Tribe (CRST Br. 3-5, 7, 16-17) insist that the State compelled CRST members to purchase South Dakota license plates and pay the South Dakota motor vehicle excise tax (SDCL 32-5B-1) through criminal sanctions. These assertions are simply inaccurate. In fact, since *Solem v. Bartlett*, 465 U.S. 463 (1984), the State has been precluded from enforcing state criminal laws (including motor vehicle licensing statutes) against Indians within the Cheyenne River Reservation. Despite the outcome of this litigation, the State

will be unable to enforce its motor vehicle licensing statutes within Indian country. Consequently, CRST members have been, since 1984, free to own and operate motor vehicles on the CRST reservation without complying with SDCL 32-5B-1, unless forced to comply by the Tribe.

The reality is that on January 14, 1987, the CRST incorporated "those provisions of the South Dakota Traffic Code Dealing with vehicle Licensing and Driver's License" into the CRST Law and Order Code. App. 51-2. In 1990, the CRST Council directed tribal law enforcement to cite motor vehicle operators driving without valid license plates into tribal court. App 54-5. The majority (App. 19) and the Respondents suggest that because neither of the above tribal enactments mentioned SDCL 32-5B-1 specifically, the CRST was not forcing their members to pay the excise tax. The problem with that argument is, of course, that no one explained that nice distinction to CRST law enforcement or the CRST membership. The CRST police department regularly issued traffic citations, levied fines, and impounded motor vehicles of CRST members without current South Dakota license plates from 1987 until March 8, 1994. Marvin LeCompte, CRST chief of police, at a deposition on March 8, 1994, was asked the following questions, and gave the following answers:

Q Are you aware of any instances where tribal police officers you supervise would have stopped vehicles for not having valid tags on their motor vehicle license plates?
A Yes.
Q Was that a common practice?
A Yes, it is.
Q For both Indians and non-Indians?
A Yes.
Q I believe you have already testified that the Indians were not cited into state court; is that correct?

A Yes.
Q Where were they cited to?
A Tribal court.
Q What were they cited for?
A Substitute plates.
Q Substitute plates?
A Not substitute plates, no valid license tags.
Q What was done in tribal court with those individuals, if you followed through on this?

. . . . (Objection omitted.)

Q Do you know what the normal penalty was?
A Oh, penalty for invalid tags?
Q Yes.
A I'm not sure. I believe it was fine of $25.
Q Were these individuals allowed to drive off with the vehicle that did not have valid tags?

. . . . (Objection omitted.)

A They were allowed to drive the vehicle off only if they showed valid tags.
Q If they were not able to show valid tags, what was done with the vehicle?
A The vehicle left impounded or left up to the judge to decide whether or not they . . .
Q Is the tribal police department still following that policy?

. . . . (Objection omitted.)

A As of today, yes.

CRST Eighth Circuit Court of Appeals Appendix, Volume 1, Exhibit 29, p. 28-30.

Relying on the argument above, both the Tribe (CRST Br. 21-22) and the United States (U.S. Br. 13-14), assert that South Dakota has never treated SDCL 32-5B-1 like a sales tax. They argue that the State should have exempted

motor vehicle purchases by CRST members at auto dealerships which they claim exist on the reservation. The argument is flawed for at least three reasons. *First*, those transactions are already exempt because the State has not, since 1984, enforced SDCL 32-5B-1 (or any other criminal statute) against Indians within the CRST reservation boundaries. *Second*, the exemption has actually been denied to tribal members because the CRST has forced its membership to buy plates, and to pay the tax by citing them into tribal court and impounding their vehicles. *Third*, South Dakota's excise tax, SDCL 32-5B-1, is typical of sales and use taxes on motor vehicles in all other jurisdictions in the Eighth Circuit. App. 24-6. Both Vermont,[1] and significantly, Louisiana impose sales and use taxes on motor vehicles which are functionally indistinguishable from South Dakota. In fact, in 1994, 46 states and the District of Columbia imposed a sales tax on the sale of motor vehicles.[2]

II. RESPONDENTS MISS THE POINT ABOUT "DEDICATED REVENUES."

Both Respondents (U.S. Br. 11 n.1, CRST Br. 14-16) criticize South Dakota's constitutional dedication of

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[1] *See* discussion of Vermont tax on motor vehicles at Pet. Br. 25-6.

South Dakota, like Vermont, imposes a motor vehicle specific sales and use tax and dedicates the revenue to "maintenance, construction & supervision of highways & bridges of this state." S.D. Const. Art. XI, § 8. Consequently, this constitutional provision requires the State to segregate these dedicated revenues from general fund sales & use tax revenues.

[2] *See* Rayola Dougher, *American Petroleum Institute, the Funding of Roads in the United States: How the Taxes and Fees Collected from Motorists are Spent*, Research Study #088 (May 1997).

motor vehicle excise tax revenues to the improvement of state highways as irrelevant. However, this Court in *Sac and Fox* observed that both Oklahoma taxes at issue raised revenue for "general governmental functions." South Dakota is different. One hundred percent of SDCL 32-5B-1 revenues are dedicated to the state highway fund and spent on roads.[3] Since the taxes at issue in *Moe*[4] and *Colville*[5] also raised "general revenue," South Dakota's tax varies from *Moe, Colville* and *Sac and Fox* in a significant manner "other than mere nomenclature."

This Court may have also had in mind its decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In *Bracker*, Arizona attempted to collect a motor carrier gross receipts tax and use fuel tax from a non-Indian contractor working for the tribe within the reservation exclusively on tribal or BIA roads. The contractor paid without protest those taxes which represented the use of state maintained roads within the reservation and challenged only that portion of the taxes which represented use of BIA or tribally maintained reservation roads. This Court held that the federal government had preempted

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[3] According to the American Petroleum Institute, almost all states and the federal government divert tax receipts from motorists to non-road uses:

> In contrast, motorists in Alaska, South Dakota, the District of Columbia, and Oregon are shown to be "subsidized." That is, the taxes and fees collected directly from motorists (exclusive of interest income and bond proceeds) in these states are less than the amounts dedicated to roads.

Dougher, *supra* n. 2, at 18.

[4] *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

[5] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

tribal timber harvesting to such an extent that imposition of these state taxes would impede the federal plan. The Court balanced the competing tribal, federal, and state interests and found that Arizona was "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation." *Bracker*, 448 U.S. at 148-9. The Court later explained its analysis:

> As noted above, this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes they seek to impose. They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads. Pinetop's business in Arizona is conducted solely on the Fort Apache Reservation. Though at least the use fuel tax purports to "compensat[e] the state for the use of its highways," Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1979), no such compensatory purpose is present here. The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber.

Bracker, 448 U.S. at 150. Consequently, if the *Bracker* analysis is applied to the instant case, a different result is mandated. The federal scheme for construction and maintenance of roads on reservations is vested in the state-federal partnership or the Bureau of Indian Affairs, not

the Tribe. The State has a specific interest in collecting the taxes at issue particularly since they are imposed upon those who use reservation roads with the proceeds dedicated to construction and maintenance of those same highways.

III. THE CONFLICT WITH *TUNICA-BILOXI TRIBE* REMAINS.

The United States (U.S. Br. 12-16) adopts the majority "form over substance" analysis that has been repeatedly rejected by this Court in *Moe* and *Colville*. Twice they suggest that the tax at issue is not a sales tax because South Dakota does not call it a "sales tax." They then compare South Dakota's *entire* sales and use tax scheme for motor vehicles to *only* the sales tax portion of *Tunica's* tax scheme. This "apples versus oranges" analysis is inappropriate for all the reasons listed in the dissent. However, a more fundamental criticism of this mixed analysis is that South Dakota has only asked for what *Tunica* allows, that is, the right to impose its motor vehicle excise tax on *off-reservation sales* to CRST members. South Dakota has always conceded its inability to enforce taxation of *on-reservation* sales of motor vehicles to CRST members; and, because the State requested only the relief allowed under *Tunica*, the majority cannot compare sales tax and use tax transactions on one hand, and ignore the use tax on the other. The majority should either compare the entire sales and use tax scheme in South Dakota with the complete Louisiana sales and use tax scheme; or, compare only the sales tax components of the South Dakota statute with *Tunica*. Either way, South Dakota would prevail.

IV. RESPONDENTS HAVE FAILED TO DEMONSTRATE THAT *SAC AND FOX* IS CONTROLLING IN THIS CASE.

Sac and Fox dealt with two Oklahoma motor vehicle taxing statutes. The first was denominated a "registration fee" but was actually an annual assessment of 1¼ percent of market value of the motor vehicle collected at registration. The second was a one-time 3¼ percent "excise tax" which is functionally similar to, but different in application from, South Dakota's SDCL 32-5B-1. *Sac and Fox* is distinguishable from this case in two major respects. *First,* Oklahoma engaged in discriminatory enforcement of their motor vehicle taxes against Sac and Fox purchasers. This Court agreed with the Tenth Circuit Court of Appeals that Oklahoma's excise tax was not a sales tax since it "is not enforced as a sales tax against Sac and Fox purchasers." *Sac and Fox,* 508 U.S. at 126, *quoting Sac and Fox Nation v. Oklahoma Tax Commission,* 967 F.2d 1425, 1430 (10th Cir. 1992).

Second, the most telling variance is imbedded in the following statement:

> Oklahoma's taxes are no different than those in *Moe* and *Colville*. **Like the taxes in both those cases, the excise tax and registration fee are imposed in addition to a sales tax**; the two taxes are imposed for use both on and off Indian country; and the registration fees are assessed annually based on a percentage of the value of the vehicle. (Emphasis added.)

Sac and Fox, 508 U.S. at 127. The highlighted quote appears to be crucial to the *Sac and Fox* result. The dissent reached the obvious conclusion.

> *Sac and Fox* is also distinguishable from the case now before us. The Supreme Court noted as significant several times throughout its discussion that the excise tax at issue in *Sac and Fox* was paid "in addition to the state sales tax,"[19]

> 508 U.S. at 119, 126, 127. Accordingly, the Court rejected the state's argument that the excise tax resembled a sales tax on transactions occurring outside Indian country. *Id.* at 126. Just the opposite is true here, where South Dakota law specifically states that the excise tax "shall be in lieu of any tax levied . . . on the sales of such vehicles." S.D. Codified Laws Ann. § 32-5B-1. Unlike *Sac and Fox*, the South Dakota motor vehicle excise tax is meant to be in lieu of the state's sales tax, not to augment it.
>
> [19]Oklahoma's "sales" tax levied on motor vehicles was not challenged in *Sac and Fox*.

App.28.

The problem is that although both Montana[6] in *Moe*, and Washington[7] in *Colville*, imposed a motor vehicle sales tax in addition to the taxes at issue; Oklahoma did not.[8]

CRST offered an alternate explanation, namely, "This statement could only mean that Oklahoma's excise tax is separate and distinct from its general sales tax." CRST Br. at 18 n.15. The CRST explanation is obviously wrong, because of the necessity that any interpretation must parallel the taxes in Montana during *Moe* and Washington during *Colville*. The CRST explanation does not work. Montana is one of the few states that does not have a general sales tax; Montana does, however, impose a "sales tax" only on motor vehicles.[9] Washington, on the other hand, imposes a "general sales tax" which *includes*

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[6] Mont. Code Ann. § 61-3-502 (1997). The version in effect in 1976 is largely the same. Rev. C. Mont. 32-3315 (1975). *See also* 1975 Mont. Laws Ch. 74, § 15.

[7] Wash. Rev. Code Ann. § 82.08.020 (1993), § 82.12.020 (1996), and § 82.12.045 (1997)

[8] Okla. Stat. Ann. tit. 68, § 1355(2) (West 1995)

[9] *See* n.6 *supra*.

motor vehicles. Neither the Montana or the Washington sales tax on motor vehicles is similar to Oklahoma's.

The United States has not offered an interpretation. Another plausible interpretation is possible in addition to the one adopted by the dissent. The Court may be referring to the multiple impositions of Oklahoma's excise tax on tribal members because "the subsequent owner must bring up the title on the vehicle by paying the current and delinquent excise taxes on the transfers of the vehicle." *Sac and Fox*, 508 U.S. at 120 (*quoting* App. 29). This interpretation is consistent with *Sac and Fox*, and should result in reversal of the majority opinion below, because South Dakota does not engage in such discriminatory application of its tax laws.

CONCLUSION

The case below conflicts with *Tunica-Biloxi Tribe*. *Sac and Fox* is distinguishable and does not control this case, or overrule *Tunica*, or resolve the conflict.

Moreover, the language from *Sac and Fox* suggesting that Oklahoma imposed an excise tax on the transfer of a motor vehicle "in addition to a sales tax" is not clear and will likely cause confusion in the future. This Court should grant review, reverse the lower court and clarify *Sac and Fox*.

Respectfully submitted,

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